

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

Petition of the Multifamily Broadband Council
Seeking Preemption of Article 52 of the San
Francisco Police Code

DA 17-318

MB Docket No. 17-91

REPLY COMMENTS OF THE CITY OF BOSTON, MASSACHUSETTS

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June 9, 2017

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EXECUTIVE SUMMARY

The City of Boston files these comments to oppose the relief sought in the Petition for Preemption filed by the Multifamily Broadband Council arguing that Article 52 of the San Francisco Police Code, is preempted by Sections 251, 624, and 628 of the Communications Act of 1934; Sections 64.2500, 68.105(d), 76.605, 76.802, and 76.2000 of the Federal Communications Commission’s (“FCC” or “Commission”) Rules, and by several Commission orders. As explained more fully below, Boston opposes such relief on legal and policy grounds. The relief requested would require the Commission to undertake a rulemaking shift in an adjudicatory matter. Worse, the relief sought would protect providers, not consumers and would delay the Commission’s goal of digital inclusion.

Further, Boston associates itself with the Comments of the City and County of San Francisco, and those other parties that support the right of states and localities to employ their sovereignty over real estate developments and real estate owners in order to promote consumer broadband choice and digital inclusion.

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I. EXECUTIVE SUMMARY

The City of Boston¹ files these comments to oppose the relief sought in the Petition for Preemption filed by the Multifamily Broadband Council (“MBC”) arguing that Article 52 of the San Francisco Police Code, is preempted by Sections 251, 624, and 628 of the Communications Act of 1934; Sections 64.2500, 68.105(d), 76.605, 76.802, and 76.2000 of the Federal Communications Commission’s (“FCC” or “Commission”) Rules, and by several Commission orders.² As explained more fully below, Boston opposes such relief on legal and policy grounds. The relief requested would require the Commission to undertake a rulemaking shift in an adjudicatory matter. Worse, the relief sought would protect providers, not consumers and would delay the Commission’s goal of digital inclusion .

¹ The City of Boston is the capital and most populous city of the Commonwealth of Massachusetts covering 48 square miles with an estimated population of 667,137 in 2015 and thus making it the largest city in New England and the 23rd most populous city in the United States. The City of Boston exists under Chapter 486 of the Acts of 1909 and Chapter 452 of the Acts of 1948 of the Commonwealth of Massachusetts, which, as amended, constitute the City’s Charter. The Mayor is elected to a four-year term and serves as chief executive officer of the City. The Mayor has general supervision of and control over the City’s boards, commissions, officers and departments. The legislative body of the City is the City Council, which consists of 13 elected members serving two-year terms. Boston Mayor Martin J. Walsh was sworn in on January 6, 2014 as the City’s 54th Mayor. Prior to his service as Mayor, Mayor Walsh was a member of the Massachusetts House of Representatives, serving as the State Representative from the Thirteenth Suffolk District from 1997 through 2013. Mayor Walsh continues to work tirelessly towards making Boston a city where everyone has the opportunity to succeed. He has identified five key priorities that build upon Boston’s strengths while bringing the City into the future. The key priorities are: strengthening the economy, improving public safety and combating gun violence, ensuring that Boston Public Schools enable every child to succeed, increasing accessibility and transparency in city government, and serving all of Boston’s neighborhoods and residents.

² *Petition of the Multifamily Broadband Council Seeking Preemption of Article 52 of the San Francisco Police Code*, MB Docket No. 17-91 (filed Feb. 24, 2017) at pp. 14-32 (“*Petition*”).

Further, Boston associates itself with the Comments of the City and County of San Francisco³, and those other parties⁴ that support the right of states and localities to employ their sovereignty over real estate developments and real estate owners in order to promote consumer broadband choice and digital inclusion.

II. FCC HAS HISTORICALLY RECOGNIZED AND PROTECTED STATE AND LOCAL GOVERNMENTS' AUTHORITY TO PROTECT RESIDENTS

What San Francisco seeks to accomplish in adopting Article 52 of the Police Code is no different than eighteen states and the District of Columbia have done with the FCC's knowledge and blessing for over four decades to ensure their citizens have access to the cable provider of their choice.⁵ Specifically, Boston urges the Commission to reject the Petition for Preemption filed by MBC.⁶ Boston would assert that the Commission lacks the authority to preempt the guaranteed choice language of Article 52, and that even if the Commission possessed such authority that such preemption would not be in consumers interest and would constitute such a dramatic change in policy that a rulemaking proceeding would need to be opened to protect all parties.

In the instant matter, the Commission need not reach that decision. The Petition should be rejected as the Commission has properly refrained from preempting similar terms in the twenty other mandatory access jurisdictions⁷ for the last thirty-five years and the Commission

³ Comments of The City and County of San Francisco (filed May 18, 2017) ("*San Francisco Comments*").

⁴ See e.g., Comments of Engine Advocacy (filed May 15, 2017), Comments Fiber Broadband Association (filed May 18, 2017); Comments of CALTEL (filed May 18, 2017).

⁵ See Comments of Fiber Broadband Association (filed May 18, 2017) at p. 5.

⁶ *Petition*.

⁷ For a list of these other jurisdictions see Fiber Broadband Association Comments (filed May 19, 2017) at p. 5. Fiber Broadband lists the mandatory access jurisdictions as Connecticut

should continue to afford such deference for the sake of a stable marketplace in which the consumer, not the provider, nor the property owner⁸, is the final decision maker as to whose service the consumer uses. Finally, a Petition for Declaratory Order is not a proper proceeding for making such a dramatic policy shift.⁹

III. PETITION FOR DECLARATORY JUDGMENT IS AN IMPROPER FORUM FOR DRAMATIC POLICY SHIFTS

Boston is well aware that as an independent agency, the FCC possesses powers that are quasi-legislative and others that are quasi-judicial. In the instant matter, the Public Notice¹⁰ did not purport to engage in any formal rulemaking or in the promulgation of any regulations, but instead sought parties' insights as the Commission sought to adjudicate the rights and obligations

(Conn. Gen. Stat. § 16-333a (2016)), Delaware (26 Del. C. § 613) (1983) (only if utility easements also exists)), District of Columbia (D.C. Code § 43-1844.1) (1981)), Florida (Fla. Stat. § 718.1232) (1982) (condos only)), Illinois (55 Ill. Comp. Stat. Ann. 5/5-1096) (1993)), Iowa (Iowa Code § 477/1) (1977)), Kansas (K.S.A. § 58-2553) (1983)), Maine (14 M.R.S.A. § 6041) (1987)), Massachusetts (Mass. Ann. Laws. Ch. 166A, § 22 (LexisNexis, 2017)), Minnesota (Minn. Stat. § 238.23) (1983)), Nevada (Nev. Rev. Stat. Ann. § 711.255) (1987)), New Jersey (N.J. Stat. § 48:5A-49) (1982)), New York (N.Y. Pub. Serv. Law § 228) (1995)), Ohio (ORC Ann 4931.04) (1998)); Pennsylvania (68 P.S. § 250.503-B) (1993)), Rhode Island (R. I. Gen. Laws, § 39-19-10) (1993)), Virginia (Va. Code Ann. § 55.248, 13:2) (1997)), West Virginia (W. Va. Code § 5-18A-1) (1995)), and Wisconsin (Wis. Stat. § 66.0421) (2001)).

⁸ Boston is well aware that property owners are entitled to certain constitutional protections and has incorporated those protections into its process as well as being in compliance with the laws of the Commonwealth of Massachusetts. (Mass. Ann. Laws. Ch. 166A, § 22 (LexisNexis, 2017)).

⁹ See 5 U.S.C. § 551 (1988); *Town of Deerfield, N.Y. v. FCC*, 992 F.2d 420 (1993); *see e.g., FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

¹⁰ *Media Bureau Seeks Comment on Petition for Preemption of Article 52 of the San Francisco Police Code filed by the Multifamily Broadband Council*, Public Notice, MB Docket No. 17-91 (rel. Apr. 4, 2017) ("Notice").

of MBC members as measured against Article 52 of the San Francisco Police Code.¹¹ It is therefore not a proper forum to change policy as requested by Petitioners and their allies.

The Supreme Court in *FCC v. Pacifica Foundation*¹² provided parties with a simple understanding of when a proceeding is an adjudicatory matter versus when such a matter might be considered a rulemaking.¹³ The 2nd Circuit in *Town of Deerfield, N.Y. v. FCC* explained *Pacifica* rule, as “...the mere presence in a decision of general statements that might have applicability to controversies between other persons does not change the character of an order from one that is essentially adjudicatory to one that is quasi-legislative.”¹⁴

The distinction between the Commission acting in a quasi-judicial manner, as it should in the instant matter, versus a quasi-legislative rulemaking, as the Petitioner and its allies encourage the Commission to act, *i.e.* expand its rules to meet the Petitioner’s request, can be seen clearly when the MBC Petition is juxtaposed with the Commission’s Notice of Inquiry¹⁵ (“MTE NOI”) on which it plans to vote in June. The MBC Petition is limited to the facts of San Francisco, while the MTE NOI seeks insights into how state and local rules impact broadband deployment

¹¹ The *Notice* from the Media Bureau, note not the Commission, reads: “MBC argues that Article 52 conflicts with the Commission’s policies on (1) competitive access to inside wiring in multiple dwelling unit buildings, (2) bulk billing arrangements, and (3) network unbundling. MBC also asserts that federal laws with respect to inside wiring are so dominant as to preempt the field of law that Article 52 occupies. We seek comment on MBC’s petition.” *Notice* at 1.

¹² *FCC v. Pacifica Foundation*, 438 U.S. 726, 734 (1978).

¹³ *See also* 5 U.S.C.A. § 551 for definitions of rule, rulemaking, order and adjudication.

¹⁴ *Town of Deerfield, N.Y. v. FCC*, 992 F.2d 420, 427 (1993), citing *FCC v. Pacifica Foundation*, 438 U.S. 726, 734 (1978).

¹⁵ *Improving Competitive Broadband Access to Multiple Tenant Environments* Notice of Inquiry/ FCC FACT SHEET - GN Docket No. 17-142 (rel. Jun. 1, 2017) available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0601/DOC-345161A1.pdf (“MTE NOI”).

nationwide. In fact, the MBC Petition's allegations are cited as an example of the claims that the Commission seeks to examine in the MTE NOI¹⁶ proceeding.¹⁷

IV. CURRENT FCC RULES GOVERN THE ACTION OF LICENSEES, NOT PROPERTY OWNERS

MBC and its allies claim that Article 52 of the Police Code of San Francisco, entitled Occupant's Right to Choose a Communications Service Provider cannot be squared with Commission policies promoting broadband deployment¹⁸ and therefore must be preempted. MBC and its allies are simply wrong. The Commission's rules and decision have all been clear. The Commission regulates the conduct of the provider, not the consumer and not the real estate owner.

MBC and its allies argue that the Commission's regulatory framework governing competitive access to inside wiring¹⁹ in multitenant buildings, bulk billing arrangements,²⁰ and forced network sharing obligations have "occupied the field."²¹ The Commission must not be

¹⁶ *MTE NOI* at ¶¶2, 9.

¹⁷ Boston plans to be an active participant in the MTE NOI.

¹⁸ Comments of Engine Advocacy (filed May 15, 2017) at p. 1.

¹⁹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Cable Home Wiring*, Report and Order, 8 FCC Rcd 1435 (1993); *see also* 47 C.F.R. §76.802; *Telecommunications Services Inside Wiring, etc.*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659, (1997); *see also Telecommunications Services Inside Wiring, etc.*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342, 1358, ¶ 39 (2003) ("2003 Wiring Order").

²⁰ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Second Report and Order, 25 FCC Rcd 2460, 2461 (2010) ("2010 Exclusive Service Contracts Order").

²¹ *Petition* at pp. 14-32; *see also*, Comments of GigaMonster, LLC (filed May 18, 2017) at p. 1. The identical claim is made in the same model comments by no less than 10 other real estate interests. For the identical formulaic claim *see* Comments of Alliance Residential LLC (filed May 12, 2017); Comments of Alliance Residential Company (filed May 15, 2017); Comments of Holland Partner Group, LLC (filed May 17, 2017); Comments of RealtyCom Partners (filed May 18, 2017).

misled by MBC's efforts to confuse the issue of preemption, or that "field" which the FCC has sought to occupy.

Each of the Commission's rules²² to which MBC cites as the basis for preemption govern the conduct of the FCC's license holders, not the conduct of the property owner.²³ In fact, the Commission took great pains to make that fact clear in a number of its orders so as to avoid 5th Amendment claims by property owners against the Commission.²⁴ For instance, in the *2007 Exclusive Service Contracts Order*, the Commission made clear that it had "... ample authority ... under Section 628(b) of the Act to adopt rules *prohibiting cable operators* from enforcing or executing contracts that give them the exclusive right to provide video programming services (alone or in combination with other services) to MDUs." (Emphasis added.)²⁵ On the other hand, the actions of San Francisco and the nineteen other jurisdictions that have created mandatory access seek to govern the conduct of the property owner.

²² See e.g. fn 6 and 7, *supra*.

²³ In fact, as Boston was assembling these Reply Comments, the FCC issued a public notice outlining an item for release at the June Public meetings in which the Commission made clear that "The Commission has *previously prohibited providers* from entering into or enforcing exclusive agreements to provide services to customers in commercial and residential MTEs." (Emphasis added.) *MTE NOI* available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0601/DOC-345161A1.pdf.

²⁴ MBC has it all wrong when it claims that the Commission gave property owners the discretion to decide whether to permit access to alternative providers. (*See Petition* at p. 18.) That right comes as the property owner and the Commission has no authority to grant or deny that right. A review of the Commission's rules makes clear MBC is wrong. The enforcement of exclusive contracts and homerun wire access is imposed on the FCC licensee, not the landlord.

²⁵ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, at 20254, ¶ 40 (2007) ("2007 Exclusive Services Contract Order").

V. FIELD IS NOT PREEMPTED

Mandatory access laws have been around for over forty years,²⁶ and a review of the rich history of the inside wire rules²⁷, exclusive agreements²⁸ and the numerous other proceedings (bulk billing²⁹) addressing building access reflect that the Commission was well aware of these laws, yet consistently refrained from intervening in the relationship between states and localities with their property owners. As the Commission explained in 2003:

States and local jurisdictions are well-positioned to decide whether the need for mandatory access laws outweighs the anti-competitive effects of such laws Therefore, we urge states and municipalities that have mandatory access laws to carefully consider the level of effective competition among MVPDs in the MDU market place, and if competition is found to be lacking, to determine whether a repeal or reform of such laws might enhance such competition and thereby benefit consumers.³⁰

Mandatory access laws are derived from state and local authority over property owners and generally share several common elements. Most prohibit property owners from interfering with a resident's right to choose among cable services, rather than granting operators a direct right to install facilities at the property. *See, e.g.*, Mass. Ann. Laws Ch. 166A, § 22 (LexisNexis, 2017). Many mandatory access laws explicitly provide for "reasonable" or "just" compensation to the

²⁶ *See* Fiber Broadband Association Comments (filed May 18, 2017) at p. 4 ("States and local governments began to enact mandatory access statutes in the 1970s, with increasing adoption in the late 1980s/early 1990s....").

²⁷ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Cable Home Wiring*, Report and Order, 8 FCC Rcd 1435 (1993); *see also*, 47 C.F.R. §76.802; *Telecommunications Services Inside Wiring, etc.*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659, (1997); *2003 Wiring Order*, 18 FCC Rcd at 1358, ¶ 39.

²⁸ *2010 Exclusive Service Contracts Order*, 25 FCC Rcd 2460 (2010); *See also*, *2007 Exclusive Service Contracts Order*, 22 FCC Rcd 20235, 20236, ¶ 1 (2007), *aff'd*, *National Cable & Telecommun. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

²⁹ *2010 Exclusive Service Contracts Order*, 25 FCC Rcd at 2461.

³⁰ *2003 Wiring Order*, 18 FCC Rcd at 1358, ¶39.

property owner for the provider's access (*see e.g.*, Mass. Ann. Laws Ch. 166A, § 22 (LexisNexis, 2017)) and establish reasonable restrictions on how a provider can access the property and must provide an indemnity to the landlord for damages caused by installation and provision of service (*Id.*);³¹ Article 52 contains all of these standard protections.³²

Unlike MBC's specious claim that Article 52 in San Francisco and ordinances elsewhere are being developed for a single carrier,³³ the real goal of mandatory access laws is to exercise a state or local government's authority over property owners to ensure that the property owners refrain from interfering with a resident's ability to choose among available providers while preserving the constitutionally protected rights of the property owner. Local governments, including Boston, do not seek to grant any individual operator a right to install facilities at the property.

Mandatory access in Boston is governed by a state law that mirrors U.S. Constitutional protections of ensuring "reasonable" compensation³⁴ to the property owner for the provider's access and establish reasonable restrictions on how a provider can access the property, while requiring that any provider that accesses a property by means of statute rather than access agreement indemnify the landlord for damages caused by installation and provision of service.³⁵

³¹ For additional examples of mandatory access requirements, *See* description in Fiber Broadband Association Comments (filed May 18, 2017) at pp. 5-7.

³² *Id.* at p. 6

³³ *See Petition* at pp. 1, 7, 9-10. The discussion on pages 9 and 10 denigrates the local decision making process in Tempe, Arizona.

³⁴ Mass. Ann. Laws Ch. 166A, § 22 (LexisNexis, 2017).

³⁵ *Id.*

VI. ADVERSE RULING COULD JEOPARDIZE BOSTON’S BROADBAND PLANS.

The jurisdictional separation at stake in this matter and the MTE NOI is not an academic exercise for the City of Boston. Boston believes that it is the first city to integrate broadband ready principles into the real estate development process and employ a national vendor to score the broadband capabilities of Boston’s properties as the City seeks to cultivate a broadband ecosystem that serves the current and future connectivity needs of Boston’s residents, businesses and institutions.

Mayor Walsh recently announced that the Boston Planning & Development Agency (“BPDA”) and the City of Boston’s Department of Innovation and Technology (“DoIT”) have entered into a Memorandum of Understanding (“MOU”) with WiredScore that will ensure that future residential and commercial developments strive to serve the broadband needs of their tenants.

The MOU will add the Broadband Ready Building Questionnaire³⁶ into the BPDA’s review process relating to new projects, planned development areas and institutional master plans to assess a project’s impact on transportation, public realm, environment and historic resources and gather public input.

The City of Boston is the first city to work with WiredScore to integrate the technical principles of broadband ready building design into the real estate development process.

³⁶ Below is information about the Mayor’s initiative to integrate broadband ready principles into Boston’s real estate development process. Wired Certification is available for existing commercial buildings, new constructions, and redevelopments. The newly released Wired Certification Guidelines for Commercial Developments and Redevelopments is a free telecom design resource available to developers, architects and engineers. The Wired Certification standards were developed in collaboration with the New York City Economic Development Corporation and an Advisory Committee consisting of leaders from tech, telecom and real estate including Google Fiber, Cisco, eBay, Time Warner Cable, Rudin Management, and WSP / Parson Brinkerhoff. and the Telecommunications Industry Association.

WiredScore is the company behind Wired Certification, the first and only international rating system for commercial real estate that allows businesses looking for office space to easily find best-in-class connected buildings. It also empowers landlords to promote their buildings' internet connectivity and infrastructure to tenants and more importantly allows tenants to have a third party certification of the level of connectivity in a building, be the real estate need residential commercial or institutional. Internet connectivity is rapidly becoming one of the most important utilities to tenants and Wired Certification provides those tenants with crucial insight into connectivity as their requirements become more complex.

The Broadband Ready Building Questionnaire furthers the City of Boston's goals to cultivate a broadband ecosystem that serves the current and future connectivity needs of residents, businesses, and institutions. Departments across the City are working to streamline and otherwise adapt existing policies and processes to enable private investment in broadband infrastructure, expand broadband competition and choice for residents and businesses, and create a built environment that is equipped to support a diverse range of connectivity purposes now and in the future.

The questionnaire was created through a collaboration process including the BPDA, the City of Boston, DoIT, and WiredScore. It will enable the BPDA and the City to:

- Collect baseline telecommunications infrastructure information to inform future building codes and development policy;
- Utilize data that is collected to better understand how developers are thinking of broadband in the development process and how the BPDA and the City can support them in integrating best practices;

- Ensure that building stock meets current and future connectivity needs of residents and businesses;
- Advance the goal of residents and businesses having the choice of 2 or more wireline or fixed wireless high-speed Internet providers;
- Prime building stock to be responsive to new and emerging technology; and
- Minimize disruption to the public right of way.

The inclusion of the questionnaire in a development permit under Article 80 (of the Boston Code) filings, should not be read as to require that developers pursue Wired Certification. If developers determine that they would like to pursue Wired Certification for their building, the developer will enter into a relationship with WiredScore that is separate and apart from the City's integration of the themes of Wired Certification into the broadband questions posed in design review process. At this time, the questions will not be used as a regulatory tool.

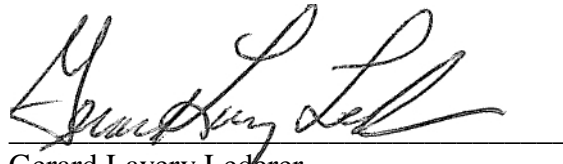
The City of Boston is concerned that a negative ruling in this matter or the MTE NOI could serve to chill Boston's and other local governments' efforts to achieve digital inclusion through voluntary efforts, competitive ecosystems, building codes and property management.

VII. CONCLUSION

In light of the above, the Petition should be denied and the authority of state and local governments to assist consumers to have access to the broadband provider of their choice should be affirmed.

Respectfully submitted

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A handwritten signature in black ink, appearing to read "Gerard Lavery Lederer", written over a horizontal line.

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